CECIL R. SHOLL

IBLA 76-29 Decided November 26, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-6492.

Affirmed.

1. Alaska: Native Allotments

   Lands withdrawn from appropriation under the public land laws and lands within Alaska State selection applications are not open to the initiation of Alaska Native allotment claims.

2. Alaska: Native Allotments

   An applicant for a Native allotment cannot tack on the use and occupancy of the land by his relatives to his own use and occupancy in order to establish the statutory 5-year period of substantially continuous use and occupancy.

APPEARANCES: Matthew B. Jamin, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This is an appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 27, 1975, rejecting the

appellant's Native allotment application on the grounds that the statute 1/ requires a 5-year period of use and occupancy, that in order to be eligible such period must be completed prior to withdrawal of the land, and that the appellant had not used and occupied the land as an adult for 5 years prior to the withdrawal.

The allotment application, filed on September 16, 1971, described a tract of land on Kodiak Island, Alaska. The application alleged on its face use of the land for hunting, berry picking, and firewood collecting by the applicant since 1950. No improvements were alleged. Subsequent documents filed by or on behalf of the appellant allege the same type of use by relatives since the 1870's and that appellant first began using the land in the 1930's as a child. 2/ It appears from the record that the appellant was born on December 10, 1931.

The Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 70 Stat. 954, authorized the Secretary of the Interior to allot not more than 160 acres of land in Alaska to any Indian, Aleut, or Eskimo who is both a resident and a Native of Alaska and who is 21 years old or the head of a family. The statute clearly states that the land to be allotted must be "vacant, unappropriated, and unreserved." 70 Stat. 954. In addition, the statute mandates that the applicant must make satisfactory proof to the Secretary of the Interior of "substantially continuous use and occupancy of the land for a period of five years." 70 Stat. 954.

The land which is the subject of this application was withdrawn from appropriation under the public land laws by Executive Order No. 8344 on February 12, 1940. Public Land Order No. 2417 revoked

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1/ Act of May 17, 1906, 34 Stat. 197, as amended, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970). This statute was repealed by § 18 of the Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973), subject to applications pending before the Department on December 18, 1971.

2/ Appellant's affidavit states that his grandfather first used the land in the 1870's for "wood collecting, hunting, berrypicking, fishing, and other collecting," and continued to use the land until his death in 1924. Appellant then states:

"His children, Tim, Nick, Justine, Nydia, Annie, Phyllis, and Alexandra used the land continuously and every year from 1924 until 1960 or so. Different ones would use the land different years, but I am sure that Tim used the land up until around 1960.

"I have claimed that my use began in 1950, but I used to go out to the land from the time that I was a small child in the 1930's."

Executive Order No. 8344 on June 29, 1961, subject to the express provision that the State of Alaska was given a preferred right to select lands released from the withdrawal by the order until December 26, 1961. 3/

A state selection application was filed on December 22, 1961, for the land which is the subject of this application. The filing of a state selection application in these circumstances has the effect of segregating the land which is the subject of the application from all appropriations based upon "application or settlement and location." 43 CFR 2627.4(b).

[1] A claim under the public land laws where full compliance with the law has not been effectuated is subject to defeat where the land is withdrawn from appropriation under statutory authority. Susie Ondola, 17 IBLA 359, 361 (1974); see Buxton v. Traver, 130 U.S. 232, 235 (1889); United States v. Norton, 19 F.2d 836 (5th Cir.), cert. denied, 275 U.S. 558 (1927). The land in appellant's Native allotment application has been continuously segregated and withdrawn from disposal since 1940, by Executive Order No. 8344, Public Land Order 2417, and the Alaska State selection application. Therefore, the applicant had to show the qualifying use and occupancy prior to February 12, 1940.

[2] This Board previously held in Susie Ondola, supra at 361:

> An allotment right is personal to one who has fully complied with the law and regulations, and the native who applies for withdrawn lands must show that he complied with the law prior to the effective date of the withdrawal; he may not tack on his deceased parents' use and occupancy to establish a right for himself prior to the withdrawal. Larry W. Dirks, Sr., 14 IBLA 401 (1974).

The allotment right is not alienable and is not subject to inheritance. Louis P. Simpson, 20 IBLA 387, 391 (1975).

The substantially continuous use and occupancy required under the Native Allotment Act must be made by the Native himself as an independent citizen or as a head of a family and not as a minor

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3/ This preference right is mandated by statute, § 6(g) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. note prec. § 21 (1970).

child occupying or using the land together with his parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76, 78 (1974). On the basis of the record, it is clear that the appellant could have only used and occupied the premises prior to 1940 as a minor child in the company of his parents and/or other members of the extended family group. This is not sufficient to qualify for a Native allotment. In view of appellant's statement (fn. 2) concerning the use of the land by his uncles and aunts, it is evident that his own use could not have been "potentially exclusive of others" as required by 43 CFR 2561.0-5.

Since appellant's claim was expressly asserted to have commenced in 1950 and, in any event, he could not have claimed the land independently prior to withdrawal of the land, and the lands have been continuously closed to the initiation of claims since 1940, it is patent that appellant acquired no rights in the land. Martha D. Taylor (On Reconsideration), 17 IBLA 329 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge